

The Office of the Adjudicator Periodic Report

October 2007

The following Report to Ofcom and the Office of Fair Trading sets out the Adjudicator's dispute determinations, his views about the operation of the Undertakings, the CRR scheme and CRR rules together with any recommendations, his views about the performance of Carlton and Granada (ITV plc) in complying with the Undertakings, his opinion about the evolution of the airtime sales market, and other relevant matters and information that he considers appropriate.

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Background

In November 2003, Undertakings were accepted by the Secretary of State for Trade and Industry pursuant to the Fair Trading Act 1973, section 88(2), from the Channel 3 Broadcasters Carlton Communications Plc ("Carlton") and Granada Plc ("Granada"), as required of them by the Secretary of State as a condition of approval of the agreed merger of those Broadcasters to form ITV plc. These Undertakings required the appointment of an Adjudicator to adjudicate on any dispute between ITV plc and advertisers/media agencies that arise out of the interpretation or exercise of the rights or obligations set out under the Contracts Rights Renewal ("CRR") remedy.

Paragraph 22 of the Contracts Rights Renewal Adjudication Scheme ("the CRRA Scheme") provides that every 3 months (or as otherwise agreed with Ofcom) the Adjudicator shall make a written Periodic Report to Ofcom and the OFT. This is a Periodic Report. The Annual Report and the Report published in October each year are made available to the public.

Pursuant to paragraph 22 of the CRRA Scheme, this Report sets out:

- the Adjudicator's determinations in relation to disputes;
- the Adjudicator's views about the performance of Carlton and Granada in complying with the Undertakings (in relation to CRR);
- the Adjudicator's views about the operation of the Undertakings (in relation to CRR), the CRRA scheme and the CRRA rules together with any recommendations;
- other relevant matters and information that the Adjudicator considers it appropriate to include.

In addition, it has been agreed with Ofcom that these Reports will also contain information on the use of the Adjudicator's budget to date. This information will not be placed in the public domain.

The level of information contained in this Report is sufficient as to inform Ofcom and the Office of Fair Trading adequately on each of these areas.

This is the redacted public version of the confidential October 2007 Periodic Report submitted to Ofcom and the OFT as required by the Undertakings.

1. Office of the Adjudicator

1.1 Core operating functions

1.1.1 The Adjudicator

In May 2006 Robert Ditcham was appointed as the Adjudicator.

1.1.2 The Office of the Adjudicator's staff

Richard Baker joined in December 2006 as deputy Adjudicator. In addition the Office has an executive assistant, Claire Gilmour. Julian Gregory, a barrister at Monckton Chambers specialising in competition law, continues as consultant legal advisor.

1.1.3 Maintaining a secure office environment and procedures

Given the confidential nature of the information that the Adjudicator's Office handles, security is a high priority. Access to Riverside House, where the Adjudicator's Office is situated, can be gained only with the use of security cards. Furthermore, the Adjudicator has put in place additional procedures to ensure that the confidential information is fully protected. In particular, the office:

- uses heavy duty safes to store all confidential information. These are kept locked at all times, and only members of staff at the Office of the Adjudicator have access to the safes;
- operates a clear desk policy;
- has a policy that generally no confidential documents should leave the building.

1.1.4 Access to appropriate information systems

The Office has online access to all of the industry data it requires, including data supplied by BARB, Donovan Data Systems and Nielsen Media Research. BARB, Donovan Data Systems and Nielsen Media Research have all been very helpful to the Office in setting these systems up and providing ongoing support. In addition, the Office has developed its own systems and processes for analysing key information.

1.1.5 Financial procedures

This is set in accordance with annex 3 of the Undertakings. Ofcom has set a budget for the total costs of the Adjudicator and his Office for each year in advance, after having consulted with ITV plc. Ofcom make payments in the first instance, but it invoices ITV plc on a quarterly basis for the actual costs incurred up to the maximum of the relevant budget.

1.1.6 The Office of the Adjudicator website

The Office's website is at www.adjudicator-crr.org.uk and houses all documentation relating to the Undertakings and the Office of the Adjudicator, including;

- the Undertakings;
- a 'technical guide to the CRR remedy';
- the process for disputes including any documentation needed to submit a dispute;
- the Adjudicator's Periodic Reports;
- updated guidance enquiries;
- other news, in particular of the OFT's announcement of the CRR Review in 2008.

1.2 Core process

1.2.1 Procedure for submitting disputes

The procedure for disputes is set out in the CRR rules (annex 3 of the Undertakings). For the purposes of clarification, the "Process for disputes" on the Adjudicator's website explains key aspects of the procedure, such as the distinction between a dispute and a complaint, the importance of making a case clearly, and the need to include evidence and relevant documentation in the Notice of Adjudication (dispute form). Prior to submitting a formal dispute, the Adjudicator recommends that potential complainants read this guidance as it will help them in formulating their case.

When a party wishes to submit a dispute, a Notice of Adjudication has to be completed. The Notice of Adjudication is a standardised form designed to minimise the administrative burden on all parties. It asks for details of the key facts and supporting evidence relating to the case. The submitted form should include a brief summary of the dispute, the number of discussions between both parties in relation to the dispute, details of the areas of change in the offer and the aspect of the offer to which the advertiser or media buyer objects along with the nature of the redress which is sought. ITV plc must also be sent a copy of this Notice of Adjudication. If the Adjudicator decides to act on the dispute, ITV plc must send a Notice of Reply setting out its response to the Notice of Adjudication.

The Office took the decision that it would give a detailed explanation for its decisions. Any confidential information provided by either party in support of its case is redacted in the explanation. The Office will make decisions on disputes using evidence supplied by the parties which is supplemented by other information to which the Office has access. Decisions will take into account, in particular, historical data, prevailing market conditions, the current contract between the parties and other contracts in the market. The decision by the Office is final and binding on ITV plc.

1.2.2 Confidentiality process

Confidentiality is of paramount importance to the operation of the Office. Confidentiality is maintained through the general office procedures set out at section 1.1.3 above and the way in which the Adjudicator deals with disputes. A limited number of people are involved in the dispute process. Confidentiality clauses are inserted on all documentation sent out to external parties involved in the dispute.

1.2.3 Maintaining information flows with ITV plc

A Memorandum of Understanding (“MoU”) was formalised with ITV plc in August 2004. This is a standardised process for the provision to the Office of certain general information and documents, i.e. information and documents that do not relate to specific disputes.

The MoU has facilitated the effective processing of information requests made by the Adjudicator, under paragraph 21 of the scheme, ensuring that there is full and timely compliance by the provision of up-to-date information within a specified deadline, without over-burdening ITV plc. The MoU covers the provision of a number of different categories of information and documents, including in particular the following:

- Copies of final sales contracts for 2007. Where contracts are not available the Office will be supplied with a summary of the key terms on which media agencies/ advertisers are trading with ITV plc.
- A fortnightly report on the past, present and future position of the trading balance by ITV plc region.
- A full report on the treatment of all bookings made after the ABD (advance booking deadline).
- A monthly summary of all DRTV (Direct Response Television) campaigns by region.

The MoU also puts in place regular status meetings between the Office and ITV plc, in which both parties are able to discuss any concerns that they might have in relation to the operation of the Undertakings. This includes a monthly meeting between the Office and ITV plc; a monthly meeting between a member of the Office and ITV plc’s sales operation controller and sales operation planning controller to discuss any issues arising from ITV plc’s trading balance figures; and a quarterly meeting between the Adjudicator and the managing director of ITV Sales.

When considered necessary, to enhance the efficiency and effectiveness of the Office, the Adjudicator will propose any amendments deemed necessary to the MoU to ITV, either in relation to the provision of data or the timetable of such provision. During March such proposals were made with reference to ITV’s Trading balance and ITV have adopted these changes.

1.2.4 Interim reports process

The Undertakings state that the Adjudicator shall bring to the attention of Ofcom and the OFT any matter that gives rise to a reasonable suspicion on his part that ITV plc is not complying with the Undertakings. If such a matter arises the Adjudicator can submit a ‘Process and Interim’ Report to Ofcom and the OFT.

1.3 Relationships with key stakeholders

In addition to the regular meetings with senior ITV staff, as laid out in the MoU, the Adjudicator has held meetings over the summer with a number of companies from the UK's advertising community. These have included advertisers, agencies, media owners and the auditing community. These meetings are held regularly with an agenda to seek views on the workings of the Undertakings and general commentary of the television marketplace. It is important for the Adjudicator to seek a broad range of opinions to understand fully the state of the market. The Adjudicator appreciates the time that these organisations provide the Office.

The Adjudicator has attended meetings with media representatives at the IPA and ISBA, the two main industry trade bodies, to seek their views of the operation of the CRR remedy. Comment from these bodies can be found in Section 5 of this Report.

2.0 Disputes and informal guidance

2.1 Disputes

The Office received one Notice of Adjudication in the last 6 months since the Annual Report was published in April 2007. The Office acted on this dispute.

The summer months tend to be the quietest time for airtime negotiation with many contracts negotiated on a calendar year basis. During the corresponding period (April - September) there had been no disputes for either of the two previous years.

The Adjudicator acted swiftly in relation to this dispute, with the dispute determination delivered within the statutory time frame as laid out within the CRR rules.

The dispute raised the following issue;

- Offering airtime on a fair and reasonable basis.

2.2 Informal guidance

Seventeen guidance enquiries were brought to the Office by advertisers and media agencies since the last Annual Report was published in April 2007. The number of enquiries was significantly higher than the previous year, when seven enquiries were brought over the same corresponding period.

As stated above in relation to disputes, the summer months tend to be the quietest time for airtime negotiation with many contracts negotiated on a calendar year basis, with most annual airtime agreements negotiated and contracted during the period between October and March. In previous years, the number of guidance enquiries has been markedly higher over the October - March period than the quieter summer months. If this trend continues, the number of guidance enquiries for the year (April 07 - March 08) will be significantly higher than last year. With the Undertakings having been in operation for nearly four years, advertisers and media agencies have become familiar with their basic rights under CRR. The fact that guidance enquiries are increasing would therefore seem counter intuitive.

The Office cannot advise on individual contracts and negotiations. Nonetheless, where an enquiry falls within the remit of the Office, it is able to provide guidance by directing the parties to the relevant sections of the Undertakings and the technical guide. Any guidance provided is without prejudice to the view that may be taken by the Adjudicator if and when the issue is brought as a formal dispute, when further information relating to the issue may be available and may need to be taken into account (for example, details of historical precedents showing how the parties have dealt with similar issues in the past). The Office has adopted the practice of confirming any guidance in writing where appropriate.

Guidance enquiries received during the period have related, among others, to the following issues.

- The review of CRR
- The meaning of fair and reasonable within the Undertakings
- The movement of an advertiser previously within an agency deal moving to a line by line deal (either with the same or a different agency)
- Charges applied by ITV to bookings made after the advanced booking deadline
- Variations to contracts
- Charges applied by ITV to campaigns wishing to defer
- CRR and burst deals
- The movement of a line by line deal between agencies

When relevant the Office will from time to time post general guidance on to the Adjudicator website: <http://www.adjudicator-crr.org.uk/enquiries.htm>. During this period no new guidance has been posted on this website.

3.0 Reporting on ITV plc's compliance

3.1 General considerations

Since the April 2007 Annual Report, ITV plc has continued to cooperate within the rules of the Undertakings.

3.2 Contracts

The issue of unsigned contracts continues to concern the Adjudicator. In previous Reports the Adjudicator has expressed his concern that a large number of contracts received by his Office were in draft form which ITV plc informed him was partly due to advertisers and media agencies failing to sign and return the draft contracts it sent out. This situation could lead to uncertainty as to the precise agreements made between the parties, which could potentially make dispute determinations more difficult.

The ITV legal team have devised a formalised timetable to cover the due process covering contract agreement. ITV plc appears to have made reasonable efforts to follow this formalised timetable during 2007. The Office will continue to work closely with ITV to ensure that ITV continues to adhere to the timetable, that the Office is provided with all contracts as they are made and that, when legitimate delays occur, the Office is aware of the issues and the key terms and elements of the deals that have been agreed.

The Adjudicator hopes that, for 2008, ITV, agencies and advertisers will all attempt to adhere to the formalised timetable and ensure that contracts are signed much earlier than they have been in previous years. In most contracts the vast majority of the obligations fall upon ITV. It would therefore appear to be to the benefit of the advertiser/media agency to have contracts signed, confirming the agreements made, so that their rights are not the subject of uncertainty.

4.0 CRR Review and related issues/relevant matters

4.1 Overview of matters

This is a new section to the Adjudicators Report as the Office enters into the period of CRR review. This section will highlight relevant events associated with this review.

4.2 CRR Review

On 6th September the OFT announced that it would be carrying out a review of the CRR Undertakings in partnership with Ofcom and that that review would begin in January 2008.

5.0 Stakeholders views of the operation of the Undertakings and the CRR scheme

This section details the verbatim replies received by the Office of the Adjudicator, following his request to the stakeholders for their views of the operation of the Undertakings and the CRR scheme. The views contained within each stakeholder response are the views of that stakeholder. They should not in any way be construed as the views or the opinions of the Adjudicator.

5.1 ISBA's view

- Although this response covers the more active period since April 2007, the detail of our comments is limited by the scheme's confidentiality, which remains good.
- Our perception is that CRR is working well and the market for ITV1 airtime is orderly. Once again, to the best of our and our members' knowledge, disputes are being resolved informally in advance or at formal determination and there are no outstanding issues.
- The CRR scheme itself continues to provide a positive impetus for ITV to optimise its audience, to advertisers' benefit. Advertisers continue to seek a competitive ITV1 and have therefore been pleased with ITV1's audience resurgence in 2007.
- Indeed, we believe that the positive force of CRR is borne out by the prediction that ITV1's share of adult impacts will increase by 1% year on year.
- We note that OFT will be initiating a review of CRR in January 2008, in co-operation with Ofcom. We envisage that Office of the Adjudicator will play a key advisory role.
- ITV1's share of TV advertisement revenue remains well over 40%, and its successful digital sibling channels lift this to about 45%. We strongly believe that this continuing dominant position necessitates continued regulatory intervention.
- We are aware that Ofcom is considering the implications of the European AudioVisual Media Services Directive, which may lead it to review the current Rules governing the Amount and Distribution of Advertising (RADA). Any changes proposed would impact on CRR, and will therefore have to be weighed and considered in that light as well as the wider viewer, advertiser and broadcaster interest.

5.2 IPA's view

Adjudicator's Report: April - September 2007

This note provides an update on the operation of the ITV Undertakings, the CRR mechanism and the Adjudicator's Office over the last six months.

1. Operation of the Undertakings

As mentioned this time last year, April - September is not a major trading period, and as in 2006, members had little new to report with regard to the Undertakings.

As ever, ITV sales continued to play a very "robust" game in the marketplace, and in the words of one respondent. "Within the practice of actual airtime trading.....are prepared to test restrictions to the limit".

Having said this, both sides now know the rules, and while the broadcaster may in specific instances deliberately adopt provocative and retaliatory action with regard to some clients – with time "disappearing" from schedules and a sudden lack of availability of key programmes – in the main, ITV appreciates how far it can go.

2. How has CRR operated?

Continued pressure across the period from ITV for the removal of CRR has met with equally sustained counter-pressure from media agencies to retain the mechanism.

In the words of one group, "Clearly the biggest issue dominating the Office (of the Adjudicator) is the announcement of the review into CRR and the airtime market in general. As a company we welcome the debate, but would state categorically that we still believe ITV would have a dominant position in the market....and as such.... some form of regulation is necessary." This view was echoed across all other respondents.

Significantly, the above agency also went on to state a growing view across IPA member agencies that if revised regulation were introduced, this "should cover *all* of ITV's broadcast interests and not just ITV1."

3. The Adjudicator's Office

As with previous Reports, respondents stressed the continued importance of the Adjudicator as a deterrent to cavalier behaviour.

There was, however, some concern that with increased familiarity, ITV may be inclined to "play the system".

In this context, specific mention was made of the referral process - with a broadcaster appearing careful to adopt a "difficult" stance on advertisers, who needed airtime at short notice.

To quote the respondent: "Even when the process of referral is at its most speedy, this will still take two working days, by which time a decision could be too late as the period for advertising could have passed".

How this problem can be addressed, we will leave to the Office of the Adjudicator, although it has been suggested elsewhere that it might need to become slightly less formal and more consultative in a marketplace, which now knows the strengths and weaknesses of the system.